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U.S. Citizenship and Immigration Services

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[redacted]

FEB 20 2004

FILE: WAC-01-257-56607 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is December 13, 1996. The beneficiary's salary as stated on the labor certification is $11.55 per hour or $24,024.00 per year.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. In a request for evidence (RFE) dated June 26, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage for fiscal year 2000. The second page of the RFE is not in the file, but the RFE is summarized in the director's decision.

The petitioner responded to the RFE with a letter dated September 16, 2002 from the owner of the petitioner and with additional evidence.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the present, and denied the petition.

Counsel's notice of appeal filed December 10, 2002 requested 60 days to submit a brier and/or evidence. Yet to date, no additional documentation has been received.

Counsel states on appeal that the director's decision fails to take into account depreciation deductions when evaluating the petitioner's ability to pay based on the petitioner's tax returns.

The financial evidence submitted by the petitioner consists of copies of Schedule C's for the petitioner for 1997, 1998, 1999 and 2001, a Form 1040 for the petitioner's owner and her husband for 2000, California income tax Form 540 returns for the petitioner's owner and her husband for 1998 and 1999, the petitioner's California business property statement Form 571-L for 2001, the petitioner's federal and state employer's quarterly tax returns for 2001, and a W-2 form for 2001 for a person who is not the beneficiary.

The director's decision found that the Schedule C's showed for 1997 a net profit of $8,604, for 1998 a net profit of $10,412, and for 1999 a loss of -$5,250. The director's decision found that the Form 1040 for the petitioner's owner and her husband for 2000 showed a "net profit" of $64,587.

The director erred in reading the Schedule C for 1997, which actually shows not a profit but a loss of -$8,604. The director also erred in describing the figure on the Form 1040 of $64,587 as a "net profit." That figure actually represents adjusted gross income on that return for the year 2000.

The director's decision does not mention the Schedule C in the record for 2001, which shows a net profit of $5,077. The director's decision also does not mention the state tax returns for the petitioner's owner and her husband. The Form 540 for 1998 for shows California adjusted gross income of $77,316 and California taxable income of $60,443. The Form 540 for 1999 shows California adjusted gross income of $65,819 and California taxable income of $50,063.

No statement of the personal living expenses of the petitioner's owner and her husband is included in the petitioner's evidence. Their state and federal returns list no dependents. Absent any statement of personal household expenses, the adjusted gross income figures ranging from $64,587 to $77,316 for the years covered by the joint returns of the petitioner's owner and her husband are insufficient to establish the ability of the petitioner to pay the proffered annual wage of $24,024 per year.

The figures on the Schedule C's mentioned above also fail to establish the ability of the petitioner to pay the proffered annual wage. The record contains no explanation for the absence of copies of federal tax returns for 1997, 1998, 1999 and 2001 to which those Schedule C's were presumably attached. The record also contains no explanation of whether the beneficiary would be replacing an existing employee or whether the position offered to the beneficiary would be a new position.

For the foregoing reasons, the decision of the director that the petitioner has failed to establish its ability to pay the proffered wage was correct.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.